Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

No._____
October Term, 1998

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JOSEPH BALDWIN CAMPBELL,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

==========

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

==========

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QUESTIONS PRESENTED FOR REVIEW

I: Whether the per capita income distributed to Joseph Baldwin Campbell from the gambling operations of the Prairire Island Indian Community in Minnesota should be allowed as an offset representing tax-exempt farm income where the Prairie Island Indian Community had prevented Campbell from using his valid tribal leasehold for farming purposes by building and operating a gambling casino on the same land leased to Campbell and by ordering Campbell not to continue to farm the land?

II: Whether the loss of supporting documentation on account of an illegal eviction by tribal authorities should allow a Petitioner in United States Tax Court to offer a less-stringent proof of his unreimbursed expenses as a member of a tribe's Environmental Protection Committee?

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PETITION FOR A WRIT OF CERTIORARI

Joseph Baldwin Campbell asks that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eighth Circuit, *Joseph Baldwin Campbell v. Commissioner of Internal Revenue*, 164 F.3d 1140 (8th Cir. 1999), submitted December 16, 1998, and filed of record January 8, 1999.

OPINIONS BELOW

This Petition seeks review of the reported decision of the United States Court of Appeals for the Eighth Circuit, *Joseph Baldwin Campbell v. Commissioner of Internal Revenue*, 164 F.3d 1140 (8th Cir. 1999), submitted December 16, 1998, and filed of record January 8, 1999, reprinted beginning on page 1a of the Appendix. Judgment was entered the same date. This appellate decision largely affirmed a reported decision of the United States Tax Court, *Joseph Baldwin Campbell v. Commissioner of Internal Revenue,* filed November 6, 1997, T.C. Memo 1997-502, reprinted at page 9a of the appendix, and the subsequent decision of the Tax Court entered November 13, 1997, reprinted at appendix page 26a. The Court of Appeals remanded the case to correct an oversight on the part of the Tax Court.

The United States Tax Court has now vacated its initial decision in the case in favor of its subsequent decision, dated March 30, 1999, which has been reproduced at page 27a of the appendix.

STATEMENT OF JURISDICTION

This petition seeks to review the decision of the United States Court of Appeals, filed January 8, 1999. Therefore, this United States Supreme Court's jurisdiction is properly based on 28 U.S.C., §1254. This petition is filed within 90 days of the Court of Appeals' entry of its final decision, January 8, 1999.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, Section 8 [3] of the Constitution of the United States of America states that "[t]he Congress shall have Power...[t]o regulate Commerce...with the Indian Tribes," and [18] to "make all Laws which shall be necessary and proper for carrying into Execution for the foregoing powers...or in any Department or Officer thereof." The Constitution also declares that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land...," Article VI [2]. Finally, the Fifth Amendment holds that "[n]o person shall be...deprived of...property without due process or law; nor shall private property be taken for public use without just compensation."

Campbell argued before the United States Tax Court and the Eighth Circuit Court of Appeals that his federally-approved leasehold and land assignment were property rights which could not be taken from him without the approval of the Secretary of the Interior and that he should not be penalized by the Tax Court for the loss of the tax benefits obtained by an Indian farming Indian trust land.

STATEMENT OF THE CASE

Joseph Baldwin Campbell, an enrolled member of the Prairie Island Indian Community in Minnesota, held a leasehold and a land assignment from his tribe. The lease and the land assignment had been approved on behalf of the Bureau of Indian Affairs and the Department of the Interior.

Campbell had improved the 270 acre-leasehold by drilling an irrigation well and by putting an irrigation system in place. Later, Campbell permitted the tribe to use ten acres of this leased property for use as a casino, but the tribe did not renegotiate the terms of the lease at that time or reduce the leasehold acreage.

The tribe notified Campbell in writing that he could not farm his leased land in 1992, but the tribal council did not obtain authorization from the Secretary of the Interior to void Campbell's lease or to change its essential terms. In fact, Robert Gray Eagle, Attorney and General Counsel for the tribe, acknowledged at a meeting of the Tribal Council on April 12, 1995, that "Joe Campbell's farm lease is [still] valid for two reasons: One, by its own terms and conditions, it has an expiration date contained within the lease agreement, and, two, several attempts have been made to cancel the farm lease, but the Bureau [of Indian Affairs']...statement was that the Bureau wasn't notified of a cancellation and a cancellation has not been submitted to them. The lease expires on its own terms on December 31, 1996," Joint Exhibit 9-I, Tax Court proceedings.

The Prairie Island tribe expanded the physical plant for its casino operations again and also constructed a large hotel complex, all on Joe Campbell's still valid leasehold.

Campbell had earned from $37,000 to $125,000 as income from crops grown on the leasehold. Campbell's operating costs were very low since he did not have costs related to property taxes or interest or debt retirement.

Campbell had incurred $10,663.16 in expenses related to his position as an Environmental Protection Specialist for the Tribe but Campbell did not receive reimbursement for approximately one-third of these expenses, about $3,550. Campbell had to reconstruct these expenses based on personal logs and diaries which he kept in places other than his house since the tribal council had forced Campbell off his land, bulldozing Campbell's house and scattering his belongings which included his expense receipts.

Campbell and the government stipulated that he had received $43,380 in per capita distributions obtained by the tribe from its gambling operations. Given that the Tribe had prevented Campbell from earning tax-exempt farm-derived income, Campbell did not pay income taxes on his 1992 per capita payment, thinking that the per capita income could be offset from what would have been his exempt farm income.

Campbell's tax preparer determined that he owed $7,243 if the per capita distributions were taxable to him; the government claimed $8,512 owed as income tax..

The United States Tax Court, the Honorable Irvin Couvillion, presiding, held that Campbell's per capita distributions were taxable income to him and that Campbell had not substantiated his unreimbursed expenses.

REASONS WHY THE WRIT SHOULD ISSUE

I: The per capita income distributed to Joseph Baldwin Campbell from the gambling operations of the Prairie Island Indian Community in Minnesota should be allowed as an offset representing tax-exempt farm income where the Prairie Island Indian Community had prevented Campbell from using his valid tribal leasehold for farming purposes by building and operating a gambling casino on the same land leased to Campbell and by ordering Campbell not to continue to farm the land.

Joseph B. Campbell's receipt of $43,380 from the Prairie Island Indian Community in 1992 should be accounted to Campbell as income attributable to farming since his Tribe prevented Campbell from using his leased land for agricultural purposes and since the Tribe and the United States' Bureau of the Interior did not cancel the leasehold held by Campbell or change its essential terms.

It is undisputed that farming-derived income earned by a member of a recognized Indian tribe from tribal land is exempt from federal income taxes, *Squire v. Capoeman*, 351 U.S. 1 (1956).

The present Campbell case is not an ordinary tax case: The lease at issue had been approved by a representative of the United States Department of the Interior for the Bureau of Indian Affairs. The land at issue is restricted land held in trust by the United States for the benefit of the Prairie Island Indian Community. Joseph Campbell farmed his leasehold.

The Corporate Charter of the Prairie Island Indian Community in the State of Minnesota states that leases "must

be approved by the Secretary of the Interior...." The terms of a lease on this reservation cannot be changed without the express written consent of the United States Secretary of the Interior.

The Tax Court claimed that "[it] is notable that petitioner [Joseph Campbell] did not provide any evidence that his lease was still valid in 1992...[and that] petitioner failed to prove on the record that the lease was valid during the year at issue. On this record, it appears that the tribal council terminated the lease pursuant to the terms of the lease." Memorandum Opinion at 14, fn. 9. This rendition of the facts is wrong-headed: The tribal council minutes acknowledge that the leasehold had not been voided or rescinded. No testimony or evidence was received which might have indicated that the Secretary of the Interior had authorized the cancellation of Campbell's lease or that the tribe had properly invoked the assistance of the Secretary.

Campbell had previously sold crops from his leased land, and he did not pay income taxes on these proceeds.

The United States Tax Court held in the present case that unless a tribal member's income is "derived directly" from the land, the income received is otherwise taxable. Joseph Campbell's income had been "derived directly" from his leased land. The United States, not having canceled his leasehold, should not complain that Campbell wants to retain the tax-exempt character of the resulting per capita distributions gotten from the tribe's businesses built and successfully operated on his leasehold.

The United States Tax Court held that per capita distributions made to Joseph Baldwin Campbell were regular,

taxable income, and should not be characterized as an offset for the loss of tax-exempt income from his leasehold.

Beck et al. v. Commissioner, TC Memo 1994-2, holds that "income derived from the rental of unimproved trust land has been found not taxable," citing *United States v. Hallam*, 304 F.2d 620 (10th Cir. 1962). Campbell should be able to directly offset his loss of farming income from his per capita payments received from the tribe.

Campbell has claimed throughout this litigation that the tribe's distributions to him ought to be characterized as farming income although this issue can only be raised for those tax years which fall during the term of years of the leasehold.

The Tax Code allows one whose land or interest in land has been condemned or involuntarily seized for governmental purposes the right to take these funds and purchase other like-property, free of tax consequences such as payment of income taxes.

A Court which is considering the value of property which has been taken by a government has a wide discretion in its admission of evidence of value, McGovern v. City of New York, 229 U.S. 363 (1913).

II: A taxpayer's loss of supporting documentation on account of an illegal eviction by tribal authorities should not allow the United States to preclude introduction of other, less formal, evidence to prove up a taxpayers' unreimbursed expenses as a member of an enrolled tribe's Environmental Protection Committee.

In the absence of records, an absence sufficiently explained by the destruction of Joseph Campbell's house and outbuildings and the subsequent loss of his personal possessions, the United States Tax Court has a duty to consider the testimony of Joseph Campbell.

As stated in the Federal Tax Coordinator 2d, Paragraphs L-1554 and L-1557, 34,078 through 34,079 (1997),

> In the absence of records, proof of amount of deduction depends on the credibility of the taxpayer.
>
> The Tax Court may accept the taxpayer's testimony that he is entitled to a deduction without substantiating documentary proof. Even where the taxpayer destroyed his original records the Tax Court has allowed some of the deductions disallowed by [the] IRS.
>
> The *Cohan* [Cohan v. Commissioner, 39 F.2d 540 (2nd Cir. 1930)] rule will not be applied unless it is proven that the taxpayer is entitled to some deduction.
>
> * * *
>
> Even where the taxpayer fails to produce sufficient evidence to enable the Tax Court to make an estimate, it *may* use its best judgment in determining the amount, if it is shown that [the taxpayer] necessarily made some expenditure.

This United States Supreme Court should apply the holding of *Squire v. Capoeman* to the facts of this case.

CONCLUSION

For all these reasons, this case should be remanded to the United States Tax Court for a decision based on this Supreme Court's now holding that taxable income should be offset, dollar-for-dollar, from non-taxable income which could have been obtained by an Indian from farming reservation land when the lease remains in effect but the Native American individual is prevented from exercising his rights under the lease.

Dated at St. Paul, Minnesota, this 8th day of April, 1999.

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United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-1648

Joseph Baldwin Campbell, *

Appellant, *

V. *

* Appeal from the United
* States Tax Court.

Commissioner of *
Internal Revenue, *

Appellee. *

Submitted: December 16, 1998
Filed: January 8, 1999

Before MURPHY, JOHN R. GIBSON, and MAGILL, Circuit Judges.

MURPHY, Circuit Judge

Joseph Baldwin Campbell appeals from a decision of the United States Tax Court[1] finding a deficiency of $8,512 on

his 1992 federal income tax obligations, as well as additions due under 26 U.S.C. §§ 6651(a)(1), 6651(a)(2), and 6654. Campbell, an enrolled member of the Prairie Island Indian Community, contends that the court erred in concluding that the per capita distribution of tribal casino proceeds he received in 1992 was taxable as ordinary income and that certain unreimbursed travel expenses were not adequately substantiated. The Commissioner of Internal Revenue supports the court's rulings on these issues but points out that no additional tax is due under 26 U.S.C. § 6651(a)(2) because that section does not apply. We affirm the judgment except for the $681 penalty imposed under § 6651(a)(2) and remand for deduction of that amount from the total due.

I.

Campbell received an assignment from the Prairie Island Indian Community in 1982 which granted him the right to occupy and use a 270 acre plot of reservation land. He lived on the land, grew various agricultural crops, and installed some irrigation equipment. Campbell agreed to relinquish 10 acres in 1983 so the Community could build a bingo hall and casino, and the parties entered into a second agreement in 1987. The Community agreed to lease to Campbell through December 31, 1996 the same 270 acres, minus some 10 acres "presently occupied by a bingo hall and parking lot." The lease limited the parties' rights to sublease, assign, or amend the lease; it also provided that it would be binding only after approval by the Secretary of the Interior. The lease was to terminate on all or part of the land, and Campbell would be entitled to no compensation, if the Community were to notify him before January 1 of any year that it would need the land for economic development the following summer. This lease was approved by the Minneapolis Area Director of the Bureau

of Indian Affairs.

On December 30, 1991, the tribal council informed Campbell that the entire 270 acre tract would be required for community economic development and advised him to cease all farming operations. Campbell questioned the validity of the council's action and protested its decision to bulldoze his two trailer homes, but he did not act to remove all of his belonging. Some of his possessions were lost when the trailers were removed, including records of his travel expenses.

Campbell's claims against the tribe eventually went to arbitration. Campbell sought a new land assignment and compensation for the destruction of his property and lost farming income. He has at this point received some compensation from the tribe, but the matters have apparently not yet been finally resolved.

Campbell's tax status was also affected. From 1982 through 1991, the income he received from farming was not taxable by the federal government. See Squire v. Capoeman, 351 U.S. 1 (1956) (recognizing tax exemption for income derived directly from land held in trust for an Indian allottee). Campbell ceased earning income from farming when the Community converted the land use to economic development, but he and other tribal members received a distribution from casino earnings. In 1992, the individual distribution amounted to $43,380 for each tribal member living on the reservation. The tribe reports such per capita distributions to the Internal Revenue Service (IRS) on forms 1099-DIV, and they are normally taxable under 25 U.S.C. § 2710(b)(3)(D). Campbell did not report his portion as income, however.

Campbell did not file a tax return for 1992, and he

received a notice of deficiency from the Commissioner for that year. The IRS indicated that he owed $8,512 in federal income tax based on his receipt of the $43,380 dividend, $1,951 in non-employee compensation from the tribal council, and $98 in interest income. The IRS acknowledged that he was entitled to a self-employment tax deduction of $138, a standard deduction of $3600, and a $2300 deduction for one exemption, but it also notified him that he owed additions to his tax. These additions were based on failure to file a timely return ($1,915 due under § 6651(a)(1)), failure timely to pay tax shown as due ($681 due under § 6651(a)(2)), and failure to pay estimated tax ($374 due under § 6654(a)). Campbell ultimately filed a tax return for 1992 showing the income and deductions figured by the IRS and an additional $1756 deduction for a business loss arising form unreimbursed travel expenses. Although he listed the tribal dividend on the return, Campbell continued to maintain that it was not taxable.

Campbell filed a case in the United States Tax Court to challenge the Commissioner's determinations. He claimed that the dividend was exempt from federal taxation because it was derived from Indian land to which he had a valid lease and because it was a substitute for framing income from that land. The parties entered into a stipulation which resolved many of the issues, but two remained for trial. The remaining issues were whether the $43,380 dividend was taxable and whether Campbell could deduct as a business loss $1756 in unreimbursed travel expenses related to his activities as a member of the tribe's environmental protection council. The tax court ruled for the Commissioner on both issues.

II.

Campbell argues that the tax court erred both in

deciding that the dividend was regular taxable income and in determining that he was not entitled to deduct his travel expenses. Decisions of the United States Tax Court are reviewed on the same basis as decisions from a civil trial before a federal district court. Black Hills Corp. v. Commissioner, 73 F.3d 799 (8th Cir. 1996). The tax court's findings of fact are reviewed for clear error and its legal conclusions are reviewed de novo. Broadway v. Commissioner, 111 F.3d 593, 595 (8th Cir. 1997); Jacobson v. Commissioner, 963 F.2d 218, 219 (8th Cir. 1992). A taxpayer bears the burden of proving that a determination made by the Commissioner was erroneous. Welch v. Helvering, 290 U.S. 111 (1933).

Campbell asserts that the $43,380 dividend is not taxable because it was received in lieu of non-taxable income from farming tribal land. He argues that he should be able to offset his lost farming income from the per capita payments. He contends that because he had a lease giving him the right to farm the land on which the casino stands and because he was prevented from exercising this right, his per capita share of casino profits represents income received in lieu of farming. The Commissioner responds that the income was not in fact received in lieu of farming, that even income received from farming is not tax exempt, and that Campbell did not have a valid lease to the land in 1992.

Tribal members are required to pay federal taxes absent an express exemption. Squire v. Capoeman, and the Indian Gaming Regulatory Act explicitly provides that per capita distributions of income from tribal casinos are subject to federal taxation. 25 U.S.C. § 2710 (b)(3)(D). Campbell has not presented any evidence of a special agreement designating the $43,380 he received in 1992 as anything other than the per

capita distribution of casino proceeds made to all tribal members living on the reservation. He has not shown that the dividend was received in lieu of farming income, and Campbell's prior farming activities do not change the character of this distribution. The tax court correctly determined that the dividend was taxable as ordinary income.

Campbell also challenges the determination that he had not provided adequate documentation to deduct certain unreimbursed travel expenses. He argues that he should not be required to meet the strict documentation standards of 26 U.S.C. § 274(d) because his records were lost when his house was bulldozed. The Commissioner responds that § 274(d) applies, and that Campbell neither provided a reasonable reconstruction of his expenses nor established that the expenses were not reimbursable.

Unreimbursed expenses incurred by an employee may be deductible under § 162(a), Primuth v. Commissioner, 54 T.C. 374, 377 (1970), but travel expenses cannot be deducted unless the substantiation requirements of 26 U.S.C. § 274(d) are met. Langer v. Commissioner, 980 F.2d 1198 (8th Cir. 1992). Section 274(d) requires the taxpayer to substantiate the amount, time, place, and business purpose of each travel expense, "by adequate records or by sufficient evidence corroborating the taxpayer's own statement." 26 U.S.C. § 274(d). When a taxpayer has lost records for reasons beyond his control "such as destruction by fire, flood, earthquake, or other casualty, the taxpayer shall have a right to substantiate a deduction by a reasonable reconstruction of his expenditures." Treas. Reg. § 1.274-5(c)(5). In order to take advantage of this exception, a taxpayer must prove that he had records which would have adequately substantiated his or her expenses and that those records were destroyed or lost in a casualty

"beyond the taxpayer's control." Treas. Reg. § 1.274-5(c)(5).

The loss of records in connection with a move is not a casualty beyond the taxpayer's control unless there are extenuating circumstances. See, e.g., Gizzi v. Commissioner, 65 T.C. 342 (1975); see also Olivares v. Commissioner, 47 T.C.M. (CCH) 165 (1983) (exemption does not apply when taxpayer had significant notice that possessions would be removed). Some lower courts have held that in extreme circumstances the loss of records cause by an abrupt eviction is sufficient to invoke this exception. See Murray v. Commissioner, 41 T.C.M. (CCH) 337 (1980). Campbell's situation was not so extreme, however. He had received notice of the council plans to destroy his trailers and had an opportunity to remove his belongings. The fact that he may not have believed the council would act as it did is not sufficient to make his eviction a casualty beyond his control. The court did not err in its application of the § 274(d) requirements and in determining that the summary of expenses Campbell submitted did not satisfy those requirements.

III.

For those reasons already discussed, the judgment of the tax court is affirmed with the exception of the inclusion of a penalty under § 6651(a)(2). Although the court's memorandum opinion noted that § 6651(a)(2) did not apply to Campbell and that it was "mistakenly included in the notice of deficiency," its final decision apparently overlooked the need to deduct the $681 originally sought by the Commissioner under this section. The case is therefore remanded to the tax court for modification of the judgment to correct this oversight.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

1. The Honorable D. Irvin Couvillion presiding.

T.C. Memo. 1997-502

UNITED STATES TAX COURT

JOSEPH BALDWIN CAMPBELL, Petitioner v.
COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 9244-95

Filed November 6, 1997.

Lawrence H. Crosby, for petitioner.
Jonathan P. Decatorsmith, for respondent.

MEMORANDUM OPINION

COUVILLION, Special Trial Judge: This case was heard pursuant to section 7443A(b)(3)[1] and Rules 180, 181, and 182.

Respondent determined a deficiency of $8,512 in petitoner's Federal income tax for 1992 and additions to tax of $1,915, $681, and $374 under sections 6651(a)(1) and (2) and 6654(a), respectively.

Following concessions by the parties, as discussed below, the issues remaining for decision are: (1) Whether per capita distributions to petitioner from the Prairie Island Tribal Council arising out of the ownership and operation of a gambling casino constitute gross income, or whether such income is "derived directly" from land owned by the Prairie Island Tribal Council and is excludable from taxation pursuant to laws, treaties, or agreements between Indian tribes and the united States Government, and (2) whether unreimbursed expenses incurred by petitioner in the course of his duties as a

member of the Environmental Protection Committee of the Prairie Island Tribal Council are deductible in 1992.

Some of the facts were stipulated, and those facts, with the annexed exhibits, are so found and are incorporated herein by reference. At the timed the petition was filed, petitioner's legal residence was Welch, Minnesota.

During all years relevant hereto, petitioner was an enrolled member of the Prairie Island Indian Community in Minnesota and resided on such tribe's reservation. In 1982, petitioner entered into a lease with the Prairie Island Tribal Council (tribal council) wherein petitioner leased from the tribal council 270 acres of the tribe's reservation for purposes of farming. The lease was for a term of 25 years. Over the entire tract of leased land, petitioner raised corn, soybeans, wheat, winter wheat, buckwheat, and seed corn. Petitioner installed various irrigation equipment over portions of the property.

In 1983, the tribal council began carrying out plans to build a bingo hall and a casino on a portion of petitioner's leased land. Pursuant thereto, the tribal council requested that petitioner cease his farming operations on a specified 10-acre portion of land leased to petitioner; the tribal council intended to use that 10 acres for the building and operation of the bingo hall and casino. Petitioner agreed to relinquish the 10 acres to the tribal council.

In connection with the further development of casino operations on petitioner's leased land, the tribal council, in 1984, terminated petitioner's lease on the 270 acres of farmland. Petitioner, however, continued to farm the land each year. In 1987, the tribal council entered into a second

lease with petitioner for the same 270 acres, less 10 acres "more or less, presently occupied by a bingo hall and parking lot." The term of this lease was 10 years, which expired on December 31, 1996.

In December 1991, the tribal council informed petitioner in writing that the entire tract of land leased to him would be required for "community economic development" (i.e., expansion of the casino buildings and operations), and that petitioner should cease all farming operations thereon. The correspondence further stated that the provisions of petitioner's second lease would terminate upon petitioner's receipt of such correspondence. Subsequently, petitioner cease all farming operations on the leased land. Under the terms of the lease, the tribal council reserved the right to terminate the lease as to all or part of the leased property for "economic development" by advising the lessee in writing on or before January 1 of the year in which the premises were required for economic development. In such event, the lessee was not entitled to compensation for termination of the lease. The lease provided otherwise where the termination notice was given after January 1 of the year for which economic development was contemplated. Nevertheless, a dispute arose between petitioner and the tribal council regarding the tribal council's right to terminate the lease and the tribal council's responsibility to reimburse petitioner for damages incurred by petitioner as a result of such termination. At the time of the trial of this case, petitioner's continuing dispute with the tribal council over this issue was scheduled for legal arbitration proceedings.

During the years of the operation of the casino, each enrolled member of the Prairie Island Indian Community to lived on the reservation received per capita distributions of a

portion of the casino's earnings for that year.[2] In other words, a portions of the casino's earnings each year was divided equally among, and distributed to each man, woman, and child who was an enrolled member of the Prairie Island Indian Community who lived on the tribe's reservation.[3] During the year in question, 1992, petitioner's per capita distribution from the casino operations was $43,380.[4] Each enrolled member of the Prairie Island Indian Community who lived on the reservation received a $43,380 distribution for the casino operation in 1992. The payment of the $43,380 per capita distribution to petitioner was reported to respondent by the tribal council on Form 1099-DIV.

Petitioner did not timely file his Federal income tax return for the year at issue. He filed his return for 1992 after the notice of deficiency was issued. In the notice of deficiency, respondent determined that petitioner had unreported income of $43,380 and unreported nonemployee compensation income of $1,951, both from the tribal council. Respondent further determined that petitioner had unreported interest income of $98 from Norwest Bank, and that he was liable for self-employment taxes of $275.[5] Respondent allowed petitioner a self-employment tax deduction of $138, a standard deduction of $3,600, and one personal exemption of $2,300. Respondent also determined that petitioner was liable for additions to tax under section 6651(a)(1) for failure to timely file a Federal income tax return, section 6651(a)(2) for failure to timely pay the amount shown as tax on the return, and section 6654(a) for failure to make estimated tax payments, in the amounts of $1,915, $691, and $374, respectively.

In a Stipulation of Settled Issues filed with the Court at trial, petitioner conceded that the nonemployee compensation

of $1,951 from the tribal council and the interest income of $98 from Norwest Bank were includable in gross income for 1992. Further, petitioner conceded that he was liable for self-employment taxes of $275, and that he was liable for the additions to tax under sections 6651(a)(1) and 6654(a).

Respondent conceded that petitioner was entitled to a self-employment tax deduction of $138, a standard deduction of $3,600, and one personal exemption of $2,300. Respondent further conceded that the addition to tax under section 6651(a)(2) was not properly applicable in this case, and that it was mistakenly included in the notice of deficiency.

The determinations of the Commissioner in a notice of deficiency are presumed correct, and the burden is on the taxpayer to prove that the determinations are in error. Rule 142(a); Welch v. Helvering, 290 U.S. 111 (1933).

The first issue is whether the per capita distribution of $43,380 from the tribal council is includable in petitioner's gross income for 1992. Petitioner contends that this distribution was in lieu of the income he would have earned from the land and, therefore, was excludable from gross income.

Section 61 provides that gross income includes "all income from whatever source derived," unless otherwise provided. The Supreme Court has consistently given this definition of gross income a liberal construction "in recognition of the intention of Congress to tax all gains except those specifically exempted." Commissioner v. Glenshaw Glass Co., 348 U.S. 426, 430 (1955); see also Roemer v. Commissioner, 716 F.2d 693, 696 (9th Cir. 1983), revg. 79 T.C. 398 (1982) ([all] realized accessions to wealth are

presumed to be taxable income, unless the taxpayer can demonstrate that an acquisition is specifically exempted from taxation.").

It is well established that American Indians are subject to Federal income taxation unless an exemption exists in the language of a treaty or an Act of Congress. Squire v. Capoeman, 351 U.S. 1, 6 (1956); United States v. Willie, 941 F.2d 1384, 1400 (10th Cir. 1991); Cross v. Commissioner, 83 T.C. 561, 564 (1984), affd. sub nom. Dillon v. United States, 792 F.2d 849 (9th Cir. 1986). The fact that petitioner is an American Indian does not preclude him from being liable for the payment of income tax. Hoptowit v. Commissioner, 78 T.C. 137, 145 (1982), affd. 709 F.2d 564 (9th Cir. 1983).

Though not specifically addressed in the Internal Revenue Code, revenue from casino gambling conducted on American Indian reservations is specifically subjected to Federal taxes under the Indian Gaming Regulatory Act, Pub. L. 100-497, 102 Stat. 2467, 2472, 25 U.S.C. sec. 2710 (1994). The Indian Gaming Regulatory Act provides that "per capita payments [of net revenues from gaming activities conducted or licensed by any Indian tribe] are subject to Federal taxation and tribes [must] notify members of such tax liability when payments are made." 25 U.S.C. sec. 2710(b)(3)(D) (1994). The tribal council did notify petitioner, as well as the other tribal members, of the taxability of their per capita distributions. The tribal council also notified respondent, on Forms 1099-DIV, of its payment of each per capita distribution.

To prevail on this issue, petitioner must point to express exemptive language in some statute or treaty that excludes the $43,380 distribution from his gross income.

Rickard v. Commissioner, 88 T.C. 188, 192 (1987); Cross v. Commissioner, supra at 564; see Welch v. Helvering, 290 U.S. 111 (1933). Petitioner claims that the Indian General Allotment Act of 1887 (Indian General Allotment Act), ch. 119, 24 Stat. 388, 25 U.S.C. sec. 331-358 (1988) provides such an express exception to Federal income taxation.[6]

The Indian General Allotment Act provided for the allotment of reservation lands to American Indians to be held in trust for allottees by the United States for a period of 25 years, or longer, during which time the allotted land cannot be alienated or encumbered. Upon expiration of the time limitation, if the allottee is determined to be competent to manage his or her own affairs, a fee patent can be issued to the allottee with respect to the allotted land. The Indian General Allotment Act serves to preserve the value of the land in trust until such time as the Secretary of the Interior determines that the allottee is competent to hold titled to the land in fee simple. County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation, 502 U.S. 251 (1992).

In Squire v. Capoeman, supra, the Supreme Court concluded that a Federal income tax exemption was created by the Indian General Allotment Act for income that an allottee derives directly from the land held in trust for him. In that case, the Supreme Court reasoned that there existed a congressional intent to exempt allotted lands from all charges and encumbrances until after the fee interest was conveyed to the allottee. It held that income received by an incompetent Indian from the sale of standing timber logged off his own allotment was exempt from Federal income tax, but "reinvestment income" was not. Id. at 9. The Court stated: "It is clear that the exemption accorded tribal and restricted Indian lands extends to the income derived directly

therefrom." Id. (quoting Cohen, Handbook of Federal Indian Law, 265, (1941); emphasis added). The stated rationale for the "derived directly" standard was that the logging of the land caused diminution of the land's value. The Supreme Court stated:

> Once logged off, the land is of little value. The land no longer serves the purpose for which it was by treaty set aside * * * and for which it was allotted to him. * * * Unless the proceeds of the timber sale are preserved for * * * [the taxpayer], he cannot go forward when declared competent with the necessary chance of economic survival in competition with others. * * * [Squire v. Capoeman, supra at 10; fn. ref. omitted.]

The courts have held that to allow taxation of the proceeds of activities that diminish the value of land allotted to an Indian runs contrary to the rationale underlying Capoeman, for it reduces the value of that which was to be preserved. See Anderson v. United States, 845 F.2d 206, 207 (9th Cir. 1988). The "derived directly" standard is settled precedent in this and all other courts that have addressed this issue. United States v. Willie, supra at 1400; Saunooke v. United States, 806 F.2d 1053, 1055 (Fed. Cir. 1986); Cross v. Commissioner, supra at 565-566.

In Stevens v. Commissioner, 452 F.2d 741 (9th Cir. 1971), affg. in part and revg. in part 54 T.C. 351 (1970), affg. in part 52 T.C. 330 (1969), the Court of Appeals for the Ninth Circuit affirmed this Court's holding that, under the "derived directly" standard, income from farming and ranching of land acquired by the Government in trust for an individual Indian

was exempt from Federal income tax. See also United States v. Daney, 370 F.2d 791 (10th Cir. 1966) (income from oil and gas leases tax-exempt); Big Eagle v. United States, 156 Ct. Cl. 665, 300 F.2d 765 (1962) (royalties from mineral deposits tax exempt).

The courts have confined the exemption to income received from activities that diminish or exploit the value of the land (such as logging, mining, or farming). Income earned through the investment of capital or labor, such as restaurants, motels, tobacco shops, and similar improvements to the land, fail to qualify for the exemption, although the activity takes place on land held in trust. See Hoptowit v. Commissioner, 78 T.C. at 145 (income received from the operation of a smokeshop on allotted land was taxable); see also Cross v. Commissioner, 83 T.C. at 566; Beck v. Commissioner, T.C. Memo. 1994-122, affd. without published opinion 64 F.3d 655 (4th Cir. 1995) (rental income derived from apartments located on Indian reservation land was not exempt); Critzer v. United States, 220 Ct. Cl. 43, 597 F.2d 708 (1979) (exemption denied for income received from the operation of a motel, a restaurant, a gift shop, and from the rental of a craft shop and apartment units). Under the rationale of these cases, the income derived from the operation of a casino would not be derived directly from the land.

In the instant case, the continued use of the trust land for casino operations does not decrease the economic value of the land. In this regard, there is no exploitation of the land by the Prairie Island Indian Community resulting in a diminution of the land's value. Moreover, persons gambling and enjoying food and drink in the casino are paying principally for the use of the casino facilities. Thus, the per capita distributions petitioner received were primarily derived from the utilization

of a capital improvement; i.e., the casino, and not from the land itself. See Beck v. Commissioner, supra.

Petitioner agrees that, absent his possession of a lease to farm the 270 acres, the $43,380 per capita distribution would be subject to Federal income tax.[8] However, petitioner argues that the existence of his lease provides him with a special exemption from the general taxability of the income derived from the casino operations. Petitioners points out that, if he had farmed the 270 acres in 1992, all the income derived from such farming activity would have been exempt from Federal income tax under the "derived directly" standard. Petitioner argues that, because he held a lease on the land upon which the casino was located and operated, the $43,380 per capita distribution he received was in lieu of the farming income he relinquished in order to allow the building and operation of the casino. Therefore, petitioner contends, the $43,380 paid to him should be exempt from Federal income tax as "substitute farm income".

The Court does not disagree that, if petitioner had continued to farm the leased land, the income derived from his farming operations would have been "derived directly" from the land and, thus, would have been exempt from Federal income taxes. See Stevens v. Commissioner, supra. However, this Court is unwilling to extend such an exemption to encompass a type of income that clearly falls outside the bounds of the "derived directly" standard, and that was clearly intended to be subjected to Federal income tax under the Indian Gaming Regulatory Act. The $43,380 per capita distribution to petitioner in 1992 was not paid in lieu of his potential farming income for that year but, rather, was paid to petitioner as a result of his status as an enrolled member of Prairie Island Indian Community and a resident on the tribal

reservation. That petitioner may have held a lease to farm the 270 acres in 1992 had no bearing on whether or not he received the per capita distribution in that year, and did not operate to change the character of the per capita distribution he received. Each and every enrolled member of Prairie Island Indian Community who lived on the reservation received an equal distribution in 1992; petitioner received the distribution regardless of whether he held a lease on the 270 acres.[9] Petitioner's argument is wholly without merit.

The Court recognizes the possibility that petitioner may have incurred some pecuniary damages as a result of his inability to farm the leased land during the year at issue. Moreover, the Court understands that petitioner may harbor feelings of inequitable treatment surrounding his relinquishment of what he regarded as tax-free farming income and the subsequent receipt by him of a taxable per capita distribution from the casino operations. Although the Court may sympathize with petitioner's quandary, this Court is a court of limited jurisdiction and lacks general equitable powers. Commissioner v. McCoy, 484 U.S. 3, 7 (1987); Hays Corp. v. Commissioner, 40 T.C. 436 (1963), affd. 331 F.2d 442 (7th Cir. 1964); see sec. 7442. The Court has no authority to disregard the express provisions of statutes adopted by Congress, even where the result in a particular case may seem harsh. See, e.g., Estate of Cowser v. Commissioner, 736 F.2d 1168, 1171-1174 (7th Cir. 1984), affg. 80 T.C. 783, 787-788 (1983). Petitioner's seemingly unfortunate circumstance does not affect his Federal income tax liability with regard to the $43,380 per capita distribution. Petitioner's recourse, if any, lies in his dispute with the tribal council, which has been scheduled for legal arbitration.

On this record, the Court holds that the $43,380 per

capita distribution received by petitioner in 1992 was not received in lieu of farming income. The Court holds further that such distribution is subject to Federal income tax under the provisions of the Indian Gaming Regulatory Act and that such income was not "derived directly" from the trust land. Respondent, therefore, is sustained on this issue.

The second issue is whether unreimbursed expenses incurred by petitioner in the course of his duties as a member of the Environmental Protection Committee (EPC) of the tribal council are deductible in 1992. Expenses incurred by an employee that are not reimbursed by the employer are generally deductible section 162(a), which allows a deduction for all ordinary and necessary expenses paid or incurred during the taxable year in carrying on a trade or business.[10] Primuth v. Commissioner, 54 T.C. 374, 377 (1970). To qualify for the deduction, an expense must be both "ordinary" and "necessary" within the meaning of section 162(a). Deputy v. duPont, 308 U.S. 488, 495 (1940). Whether the amount disallowed by respondent constitutes an ordinary and necessary expense incurred in the operation of the taxpayer's trade or business as an employee is a question of fact to be determined from the evidence presented, with the burden being on the taxpayer to overcome the presumed correctness of respondent's determination. Rule 142(a); Welch v. Helvering, 290 U.S. 111 (1933); Allen v. Commissioner, T.C. Memo. 1988-166.

Deductions are a matter of legislative grace, and the taxpayer bears the burden of proving entitlement to any deductions claimed. New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440 (1934). Furthermore, a taxpayer is required to maintain records sufficient to establish the amount of his or her income and deductions. Sec. 6001. Under certain

circumstances, where a taxpayer establishes entitlement to a deduction, but does not establish the amount of the deduction, the Court is permitted estimate the amount allowable. Cohan v. Commissioner, 39 F.2d 540 (2d Cir. 1930). However, there must be sufficient evidence in the record to permit the Court to conclude that a deductible expense was incurred in at least the amount allowed. Williams v. United States, 245 F.2d 559, 560 (5th Cir. 1957). In estimating the amount allowable, the Court bears heavily against the taxpayer whose inexactitude is of his or her own making. Cohan v. Commissioner, supra at 544.

The deduction for travel expenses away from home, including meals and lodging, under section 162(a)(2), is conditioned on such expenses being substantiated by "adequate records" or by sufficient evidence corroborating the claimed expenses pursuant to section 274(d). Sec. 1.274-5(a)(1), Income Tax Regs. To meet the adequate records requirements of section 274(d), a taxpayer "shall maintain an account book, diary, statement of expense or similar record * * * and documentary evidence * * * which, in combination, are sufficient to establish each element of an expenditure". Sec. 1.274-5(c)(2)(i), Income Tax Regs. (emphasis added). The elements to be proven with respect to each traveling expense are the amount, time, place, and business purpose of the travel. Sec. 1.274-5(b)(2), Income Tax Regs. The substantiation requirements of section 274(d) are designed to encourage taxpayers to maintain records, together with documentary evidence substantiating each element of the expense sought to be deducted. Sec. 1.274-5(c)(1), Income Tax Regs.

Respondent argued that petitioner's position with the EPC was purely a volunteer position and, therefore, was not in

connection with a profit-motivated trade or business.[11] Further, respondent argued, petitioner's participation as a member of the EPC was not regular, continuous, and with the primary purpose of making a profit as required by section 162. Finally, respondent argued, petitioner failed to substantiate the amount of his travel expenses incurred away from home, as required by section 274(d).

The expenses petitioner claimed were travel expenses incurred with respect to trips taken by petitioner in connection with his duties as spokesperson for the EPC. Petitioner introduced into evidence a computer-generated printout, which he had prepared in anticipation of trial, of the amounts and descriptions of his claimed expenses. However, petitioner failed to produce any receipts or other similar corroborative evidence to substantiate the various amounts, times, places or business purposes of the claimed expenses. In short, petitioner failed to introduce any documentary evidence sufficient to support his claimed expenses incurred in connection with his duties as a member of the EPC.

The Court finds that petitioner's records are insufficient to satisfy the stringent substantiation requirements of section 274(d). In the case of travel expenses, specifically including meals and lodging while away from home, as well as in the case of entertainment, section 274(d) overrides the so-called Cohan doctrine discussed earlier in this opinion. Sanford v. Commissioner, 50 T.C. 823, 827 (1968), affd. per curiam 412 F.2d 201 (2d Cir. 1969); sec. 1.274-5T(a), Temporary Income Tax Regs., 50 Fed. Reg. 46014 (Nov. 6, 1985). The Court is unable to use its discretion in allowing any of the travel expenses claimed by petitioner. Since petitioner did not substantiate his expenses under section 274(d), respondent is sustained on this issue. The Court finds

it unnecessary to consider the other arguments raised by respondent on this issue.

Decision will be entered for respondent.

[1] Unless otherwise indicated, section references are to the Internal Revenue Code in effect for the year at issue. All Rule references are to the Tax Court Rules of Practice and Procedure. At the time the petition was filed, petitioner elected to have his case considered as a small tax case under sec. 7463. Prior to commencement of trial, petitioner elected to have the case considered as a regular case under sec. 7443A(b)(3). The Court granted petitioner's motion, at which time respondent filed an answer.

[2] The Court surmises from the record that, originally, these distributions were paid on a quarterly basis, but eventually the payments were made on monthly basis.

[3] Through 1994, each member of the tribe who lived on the reservation, including children of all ages, received an equal distribution of the earnings. For 1995 and subsequent years, the apportionment was altered so that the children (those under the age of 18) received only 15 percent of the amount of the distributions received by the adults.

[4] Petitioner testified that he received the following per capita distributions from casino operations for years prior and subsequent to the year at issue: (1) for 1990- -$200, (2) for 1991- -$19,000, (3) for 1993- -$45,000, (4) for 1994- -between $70,000 and $80,000, and (5) for 1996- -between $90,000 and $100,000. Petitioner did not file a Federal income tax return for any of these years.

[5] All the unreported income adjustments were based on information reported to respondent by third party payers.

[6] Petitioner alleges, and the Court surmises from the record, that the leased land in this case is governed by the Indian General Allotment Act rather than by a Federal statute specifically addressing the tribal lands of the Prairie Island Indian Community. Nevertheless, it has been held that the test of entitlement to a Federal income taxation exemption would be the same under the Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, 25 U.S.C. sec. 331-358 (1988), and a Federal statute specifically addressing the tribal lands of the Eastern Cherokee Indians. See Saunooke v. United States, 806 F.2d 1053, 1055 (Fed. Cir. 1986).

[7] Citing these cases, in Cross v. Commissioner, 83 T.C. 561, 566 (1984), affd. sub nom. Dillard v. United States, 792 F.2d 849 (9th Cir. 1986), this Court adopted a narrow reading of the "derived directly" exemption, observing that it had been applied only in situations where there is exploitation of the land itself.

[8] The courts have uniformly denied an exemption for an Indian's distributive share of income derived from unallotted tribal lands held in trust for the tribe as a whole. E.g., Anderson v. United States, 845 F.2d 206 (9th Cir. 1988); Holt v. Commissioner, 364 F.2d 38 (8th Cir. 1966), affg. 44 T.C. 686 (1965).

[9] It is notable that petitioner did not produce any evidence to show that his lease was still valid in 1992 (i.e., had not been validly terminated by the tribal council in 1991). This may be one of the issues to be resolved in the arbitration of petitioner's dispute with the tribal council. The validity of

the lease is made moot by this Court's determination that the existence of the lease has no bearing on the taxability of the subject per capita distribution. Nevertheless, petitioner failed to prove on this record that the lease was valid during the year at issue. On this record, it appears that the tribal council terminated the lease pursuant to the terms of the lease.

[10] For tax years beginning on or after Jan. 1, 1987, as in this case, miscellaneous itemized deductions, including unreimbursed employee expenses, are deductible, under sec. 67(a), only to the extent that the aggregate miscellaneous itemized deductions exceed 2 percent of the taxpayer's adjusted gross income. Tax Reform Act of 1986, Pub. L. 99-514, 100 Stat. 2085.

[11] Petitioner admitted at trial that his position with the EPC was a volunteer position.

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

JOSEPH BALDWIN CAMPBELL, Petitioner,	)	
v.	)	
	)	Docket No. 9244-95
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)	

DECISION

Pursuant to the determination of the Court, it is

ORDERED and DECIDED that there is a deficiency in Federal income tax due from petitioner for the taxable year 1992 in the amount of $8,512.00;

That there is an addition to tax due from petitioner, under section 6651(a)(1) and (2), for the taxable year 1992, in the amounts of $1,915.00 and $681.00, respectively; and

That there is an addition to tax due from petitioner, under section 6654, for the taxable year 1992, in the amount of $374.00.

(Signed) D. Irvin Couvillion
Special Trial Judge

ENTERED: November 13, 1997

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

JOSEPH BALDWIN CAMPBELL, Petitioner,	)
v.	)Docket No. 9244-95
COMMISSIONER OF INTERNAL REVENUE, Respondent.	)

ORDER AND DECISION

This case was assigned to the undersigned Special Trial Judge by order of the Chief Judge of this Court dated March 24, 1999, for purposes of conducting any further proceedings pursuant to the mandate of the United States Court of Appeals for the Eighth Circuit. By Judgment dated January 8, 1999, the United States Court of Appeals for the Eighth Circuit remanded this case to the United States Tax Court "for proceedings consistent with the opinion of this Court". A decision was entered in this case by this Court on November 13, 1997, and provided, in pertinent part: "That there is an addition to tax due from petitioner, under section 6651(a)(1) and (2), for the taxable year 1992, in the amounts of $1,915.00 and $681.00, respectively".

At the trial of this case, counsel for respondent advised the Court that the addition to tax due under section 6651(a)(2) was improper, and that said addition to tax was mistakenly included in the notice of deficiency. This was noted by this Court in the Memorandum Opinion filed in this case on November 6, 1997, T.C. Memo. 1997-502. The decision of

this Court, however, as noted above, held that petitioner was liable for the section 6651(a)(2) addition to tax. Section 6651(a)(2) provides generally for an addition to tax for the failure to pay the amount shown as tax on any return. This Court has held that the addition to tax under section 6651(a)(2) can be summarily assessed and collected by respondent and, as such, said addition to tax is not subject to the deficiency procedures and, therefore, is beyond the scope of this Court's jurisdiction. Meyer v. Commissioner, 97 T.C. 555, 560 (1991). This Court, therefore, had no jurisdiction in this case over the section 6651(a)(2) addition to tax, and the decision entered by this Court in this case on November 13, 1997, providing that petitioner was liable for the section 6651(a)(2) addition to tax was erroneous. There is no need for any further proceedings in this case. Accordingly, pursuant to the mandate of the United States Court of Appeals for the Eighth Circuit, it is

ORDERED that the decision entered in this case on November 13, 1997, is vacated and set aside. It is further

ORDERED and DECIDED that there is a deficiency in Federal income tax due from petitioner for the taxable year 1992 in the amount of $8,512.00;

That there is an addition to tax due from petitioner, under section 6651(a)(1), for the taxable year 1992, in the amount of $1,915.00; and

That there is an addition to tax due from petitioner, under section 6654, for the taxable year 1992, in the amount of $374.00.

(Signed) D. Irvin Couvillion
Special Trial Judge

ENTERED: MAR 30 1999